

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARC A. MONTGOMERY,

Defendant.

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CASE NO. 1:17-cr-00060

ORDER

[Resolving Docs. [151](#) & [152](#)]

JAMES S. GWIN, UNITED STATES DISTRICT COURT JUDGE:

Inmate Marc Montgomery moves pro se for relief from his armed-robbery conviction and 140-month prison sentence. Specifically, Montgomery asks for a new trial, relief from judgment, and a hearing to decide whether co-conspirator statements were admissible. Montgomery also asks for a court-appointed attorney.

Because Montgomery's motion collaterally attacks his conviction and sentence, the Court construes the motion as a second-or-successive motion under 28 U.S.C. § 2255(h) and **TRANSFERS** the motion to the Sixth Circuit for certification. And because Montgomery's mental-health issues may impede his ability to represent himself, the Court **GRANTS** Montgomery's motion for an attorney.

Since his 2017 conviction for conspiring to rob a bank with a firearm, Montgomery has attacked his conviction and sentence several times.¹ Montgomery's postconviction efforts included an unsuccessful collateral attack under [28 U.S.C. § 2255](#).²

Now, Montgomery asks for a new trial under [Federal Civil Rule 59\(e\)](#), relief from this

¹ Docs. [44](#) (new trial); [46](#) (new trial); [54](#) (reconsider new-trial denial); [76](#) (direct-appeal notice); [100](#) (§ 2255 collateral attack); [133](#) (§ 2255 denial appeal notice).

² Doc. [100](#).

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Court's judgment under [Federal Civil Rule 60\(b\)\(6\)](#), and a *James*³ hearing (in this Circuit, called an *Enright* hearing⁴). Broadly speaking, Montgomery renews arguments that insufficient evidence supported his role in the conspiracy. Montgomery also suggests that the Court miscalculated his sentence and makes some judicial-bias arguments.

Because Montgomery files pro se, the Court liberally construes his motions.⁵

First, the Federal Civil Procedure Rules do not apply to criminal proceedings. So, the relief available to civil litigants under Rules 59 and 60 are unavailable to criminal defendants. Similarly, an *Enright* hearing gives only a pretrial procedure to decide whether the Court will admit certain conspiracy evidence—not a postconviction-relief procedure.

Instead, a criminal defendant like Montgomery, who asks the Court to “vacate ... or correct his sentence”⁶ based on errors in the proceedings, seeks relief under § 2255. The Court therefore construes Montgomery's motion as a new § 2255 motion.

Montgomery has filed one § 2255 motion already. This Court therefore cannot consider any second-or-successive motion unless the Sixth Circuit certifies that the new motion contains newly discovered, qualifying evidence or a new constitutional rule.⁷ So, the Court transfers this motion to the Sixth Circuit.

The Court will grant Montgomery's motion for an attorney. Montgomery has been diagnosed with a litany of mental-health conditions that may make it difficult for Montgomery to pursue this collateral attack pro se.⁸

³ [United States v. James](#), 590 F.2d 575 (5th Cir. 1979).

⁴ [United States v. Enright](#), 579 F.2d 980 (6th Cir. 1978); *see also* [United States v. Tomes](#), 3:16-CR-00113-TBR, 2018 WL 616146, *7 (W.D. Ky. Jan. 29, 2018) (“[A] pretrial hearing ‘to determine the admissibility of any alleged co-conspirator statements’ ... is known as a *James* hearing or, in the Sixth Circuit, an *Enright* hearing.”).

⁵ [Boag v. MacDougall](#), 454 U.S. 364, 365 (1982) (per curiam)

⁶ Doc. 151 at 20 (PageID 1652) (Montgomery's Motion). Montgomery also quotes at length the § 2255 standard. *See id.* (quoting [Pough v. United States](#), 442 F.3d 959 (6th Cir. 2006)).

⁷ *See* 28 U.S.C. § 2255(h).

⁸ *See* Doc. 68 ¶¶ 69–70 (PageID 434) (Presentence Investigation Report).

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For the above reasons, the Court **GRANTS** Montgomery's motion for an attorney and **TRANSFERS** the second-or-successive § 2255 motion to the Sixth Circuit for certification.

IT IS SO ORDERED.

Dated: July 18, 2023

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE